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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 799

WILLIAM H. ANDERSON and HARRY J. HAGEN,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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OPINION BELOW.

The Opinion of the Court of Appeals is set forth in the Appendix, infra, pp. 21-39, and is officially reported in 262 F. (2d) 764.

JURISDICTION.

The judgments of the Court of Appeals were entered on February 28, 1959. A timely petition for rehearing was filed, and same was denied by the Court on February 26, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

(1) Can there be an indictment under the Hobbs Act, Title 18, U. S. C., Section 1951, which charges an **attempt** to affect interstate commerce.

(2) Is the verdict of the jury in acquitting defendants on the substantive count of affecting commerce inconsistent with the verdict of guilty of attempting to affect commerce.

(3) Must a trial court define the alleged offense of an attempt to obstruct, delay or affect interstate commerce in order to permit the jury to apply the law to the facts.

(4) At the trial defendants were denied access to admitted existing written statements made by government witnesses to F. B. I. agents, contrary to this Court's decision in Jencks v. United States, 353 U. S. 657.

The questions presented are:

(a) Were defendants herein denied their constitutional right as determined by the Jencks Case, to inspect existing statements of government's witnesses for use in their defense?

(b) Did later enactment of Section 3500 of 18 U. S. C. A. preclude the granting of a new trial to these defendants who were denied their constitutional right to a fair and impartial trial under the then existing law established by this Court in the Jencks decision?

(5) During the course of this protracted three-week long trial, the largest local newspapers, The St. Louis Globe-Democrat and The St. Louis Post-Dispatch, both enjoying nation-wide reputations and circulation, and more particularly throughout the federal Eastern Judicial District of Missouri, published several editorials, articles and cartoons primarily condemning this Court's decision in the

Jencks Case, and the defendants' attempt to avail themselves of the Jencks decision in their defense.

The question presented is, in view of the highly inflammatory and prejudicial dissemination of articles, editorials and cartoons, primarily denouncing the Jencks decision, were the defendants afforded a fair and impartial trial by jury?

(6) After the jury had deliberated for approximately four hours, the trial Court at 9:40 P. M., recalled them to inquire as to their progress. The Court carried on a colloquy with the jury foreman asking if the jury were near a verdict, if they were hopelessly deadlocked, and if given more time they could arrive at a verdict. To the latter question the foreman responded: "I doubt it very much, Your Honor." The Court then made pointed inquiry as to their division.

The question presented: Was the Court's inquiry as to the division of the jurors coercive and prejudicial?

STATUTE INVOLVED.

Hobbs Act, 18 U. S. C., § 1951, 62 Stat. 793.

"That which is pertinent here provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00 or imprisoned not more than twenty years, or both.

"(b) As used in this section.

* * * * * * *

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened forces, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

STATEMENT.

Petitioners along with another co-defendant, Lee, were indicted under a three count indictment charging a violation of the Hobbs Act, 18 U. S. C., Section 1951. Count I charged defendants with a conspiracy to obstruct, delay and affect commerce by an attempt to extort. Count II, the substantive count, charged that defendants did obstruct, delay and affect commerce by an attempt to extort. Count III charged that the defendants did attempt to obstruct, delay and affect commerce by an attempt to extort.

The jury acquitted Lee on all three counts. Petitioners were acquitted on Counts I and II, but were found guilty on Count III. They were sentenced to five years imprisonment (R. 214-215, 238-240).

Prior to the trial, defendants' motions to dismiss Count III of the indictment, which challenged the sufficiency of said count, were overruled (R. 6, 13, 20).

The government conceded in its opening statement that the Richard I. Johnson Plastering Company did not commence work under its contract with the general contractor,

and that at no time did any money change hands (R. 26). Furthermore, there was no evidence adduced at the trial showing any violence, work stoppages or economic loss suffered. If anything, there was a substantial profit made by the Johnson Company in brokering the lathing and plastering work to local contractors (R. 102).

In the year 1950, the Del E. Webb Construction Company had the general contract for the construction of a Veterans Administration Hospital in St. Louis, Missouri. On December 13, 1950, the Richard I. Johnson Plastering Company executed a contract with the Webb Company for the plastering company to do the lathing and plastering work. Prior to the latter contract, and towards the end of November, 1950, Richard I. Johnson, president of the plastering company, and his general manager, Hanson, arrived in St. Louis. Through material suppliers, Johnson contacted defendant Anderson, a plastering union representative. An appointment was made by the two men to meet at the office and home of defendant Hagen, a lathing union representative. Hagen, although present, took no part in a conversation between Johnson and Anderson. From this initial contact five subsequent meetings occurred between either one or all three defendants with the government's witnesses. The opinion of the Court below, set forth in the Appendix, infra, contains the Government's testimony as to these occurrences, which were disputed by defendants and their witnesses.

During the cross-examination of Government's witnesses, the latter having acknowledged that they gave a number of statements to agents of the F. B. I., defendants moved for production of same for their inspection. The trial Court examined these statements and reports and denied defendants' motion. Because of the importance of this matter, in view of this Court's decision in **Jencks v. United States, 353 U. S. 657,** lengthy discourses ensued between

the parties, and in most instances within the hearing of the jury, on Johnson's testimony (R. 48-70); on Hanson's testimony (R. 96-102); and on McAllister's testimony (R. 121-124). As these arguments were being presented in support of defendants' motion for production of these F. B. I. reports, the St. Louis Globe-Democrat published a scathing lead editorial entitled "Dangerous Wake of Jencks Decree" (R. 83). Said article, in addition to being critical of this Court, linked defendants with notoriously known criminals, attempting an easy out in the Federal Court (R. 83). A motion for mistrial was overruled by the Court (R. 82). Ten days later, on July 10, 1957, the St. Louis Post-Dispatch published an article covering defendant Hagen's testimony, and in addition referred to a 1937 trial wherein all defendants were among nine who were acquitted of a conspiracy to defraud the United States. The Court in this instance also overruled a motion for mistrial (R. 181-182).

The following day the St. Louis Globe-Democrat published another lead editorial and cartoon entitled "Balancing the Scales of Justice" and "No Place for Their Nose," respectively (R. 173). Both were highly critical of this Court for the Jencks decision. The cartoon depicted criminals and subversives in the F. B. I. files, "Courtesy of the Supreme Court." A motion for a mistrial was again overruled (R. 174).

The Court's charge to the jury began with a reading of the Hobbs Act and continued with a brief summary of the three counts of the indictment. The Court summarized Count III as follows:

> "Count III of the indictment involves the same matters as Count I and II, but in this count the charge against the defendants is that they attempted to obstruct, delay and affect commerce by the aforesaid means." (R. 195)

No further instructions were given on this third count.

The Court further charged, as follows (R. 198):

"I charge you as a matter of law, that if you believe the testimony of the government witnesses with reference to the federal jurisdictional element of interstate commerce involved in this case, that is to say, the government's testimony with reference to the bringing of various materials, commodities, and equipment, from out of state to the job site in question in this federal judicial district, then you are instructed that defendants' activities as shown by the government's testimony, if you believe the same, did delay, obstruct and affect interstate commerce as that language is used in the statutes under which these charges are brought. That is to say, if you find the facts to be as testified to by the government's witnesses, the Court has determined as a matter of law that there has been a substantial affect on interstate commerce shown here by the United States and that question is not for your determination. However, before you can find the defendants guilty under any or all of the counts in the indictment you must find beyond a reasonable doubt that the defendants extorted money or property or conspired to do so, as those terms are defined in the statute and other instructions given you by the Court."

After the jurors had deliberated for approximately four hours, the Court recalled the jury. The following proceedings occurred (R. 212-213):

(The jury returned to the court room at 9:40 o'clock p. m., and the following proceedings transpired):

"The Court: The Court has sent for you to make inquiry about the situation. It is getting late. There are ladies on this jury. I don't want to have to keep

you too late, and I want to make some inquiries. I want the foreman to speak for you. I want you to be very guarded, not volunteer any information that is not asked for. In the first place, the Court would like to ask—the foreman may answer: Do you think you are getting anywhere near a verdict?

The Foreman: No, Your Honor.

The Court: Do you think it is going to be possible for this jury to arrive at a verdict? Do you think you are hopelessly deadlocked?

The Foreman: I can't answer that honestly.

The Court: Do you think if given more time that perhaps you could arrive at a verdict?

The Foreman: I doubt it very much, Your Honor.

The Court: I don't like this kind of weather. We have ladies here, have to get home. I don't like to keep this jury too late. I had to keep one here recently after one o'clock and I am not going to do that in this case. I would like to know, and you may sound out the jury and answer for them, what is their view whether or not they would rather remain here longer in session tonight or rather be excused until tomorrow morning, or what, if any of them have any vital reason why they should not stay over I don't want to force them. I am under the impression some of the jurors have commitments, engagements or something, it would be very awkward for them to have to come back tomorrow. You may sound out the jury and tell me about that. Don't tell me how they stand or how they are divided. I might ask you this much, I want no numbers, don't tell me how much on one side or the other, but are they at all evenly divided, or is it very much one way or very much the other?

The Foreman: It is pretty evenly divided, Your Honor.

The Court: You may sound them out and let me know how they feel, whether they would rather have

me excuse them until tomorrow morning or not. You may ask them privately, if you want to.

(The jurors apparently are conferring among themselves, in the jury box.)

The Foreman: Your Honor, it appears that we are about evenly divided as far as coming back tomorrow or staying.

The Court: All right. It is your own fault. They have thrown themselves on the tender mercy of the Court, and the Court has no mercy. * * * "

REASONS FOR GRANTING THE WRIT.

(1) The Court below, in affirming the judgments of conviction, rendered a decision in conflict with the holdings of other courts of appeal. The issue involved here has not been settled in this Court, and a ruling by this Court is essential to clarify the conflicting decisions and the intent of Congress in the enactment of the Hobbs Act, 18 U. S. C., Sec. 1951, 62 Stat. 793.

Defendants were charged in a three-count indictment with violating the Hobbs Act. Defendants were acquitted of conspiring to obstruct, delay or affect commerce by an attempt to extort as well as the substantive count of obstructing, delaying and affecting commerce by an attempt to extort.

From the filing of the indictment in the United States District Court, defendants attacked the sufficiency of Count III (R. 6, 13). Count III charged that defendants did attempt to obstruct, delay and affect commerce. The statute, 18 U. S. C. 1951, as is pertinent here, provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by robbery or ex-

tortion or attempts or conspires so to do * * * shall be fined * * *." (Emphasis supplied.)

The salient phrase applicable here is "or attempts or conspires so to do." The aforesaid phrase relates back to robbery or extortion and not to the jurisdictional elements of obstruction, delaying, or affecting commerce. This construction has been promulgated by other appellate courts.

In **United States v. Floyd (1956) 7 Cir., 228 F. (2d) 913, l. c. 919,** the Court states:

> "Thus, the offense consists of two essential elements, (1) extortion or attempted extortion, and (2) that such extortion or attempted extortion affected interstate commerce."

Also in **United States v. Varlack (1955), 2 Cir., 225 F. (2d) 665, l. c. 671:**

> "* * * An examination of the various forms taken by this legislation since the passage of the anti-racketeering act of 1934 makes it clear, beyond cavil, that the Congress sought to apply criminal sanctions to acts constituting extortion or robbery or attempts or conspiracies to commit such acts providing only, as indeed the constitutional prerequisites to legislative jurisdiction require, that the conduct obstructed, delayed, affected or in some other way related to interstate or foreign commerce or the movement of commodities in such commerce."

In **United States v. Kemble (1952) 3 Cir., 195 F. (2d) 889,** the Court interpreted the intent of Congress in the enactment of the Hobbs Act, on **page 891:**

> "Beyond formal reorganization and improvements in language, the principal change accomplished by the new bill was the alteration of the exception, the

effect of which had been stated in the Local 807 case.* More particularly, the 1946 re-enactment combined interference with interstate commerce by actual or attempted extortion."

In still another 7th Circuit case, **United States v. Green (1957), 246 F. (2d) 155, l. c. 159,** the Court held that the offense under the Hobbs Act was an "attempt" case, in view of the fact that no money changed hands. The Court held:

"In considering the question of the sufficiency of the evidence, it is to be borne in mind that this is a so-called 'attempt' case, in view of the fact that no money was ever received."

A comparable case decided by this Court dealing with matters before the National Labor Relations Board required that the activities of the defendants must affect interstate commerce or else the Board would have no jurisdiction. This Court held in **National Labor Relations Board v. Denver Building & Construction Trades Council, 341 U. S. 675, 683-684, 71 Sup. Ct. 943, 95 L. Ed. 1284** as follows:

"The activities complained of **must** affect interstate commerce in order to bring them within the jurisdiction of the Board." (Emphasis supplied.)

The defendants here were convicted of what purports to be an offense of **trying** to obstruct, delay or affect commerce by an attempt to extort. Trying or attempting to murder, as an analogy, is not the same as murder. The jurisdictional element necessary under this statute requires an effect in some manner upon interstate commerce. The trial court in instructing the jury patently charged that it was for the jury only to determine whether it would believe the government's witnesses as to the movement of articles

* U. S. v. Local 807, 315 U. S. 521.

in interstate commerce, leaving it to the Court to determine whether commerce had been affected. The trial court in part instructed:

> "• • • That is to say, if you find the facts to be as testified to by the government's witnesses, the Court has determined as a matter of law that there has been a *substantial effect on interstate commerce* shown here by the United States and that question is not for your determination" (R. 198).

The fact that penal statutes are afforded strict construction is academic. The courts should not, however, disregard the evident intent of Congress. The decision of the court below has disregarded the manifest intent of the Congress and of the holdings of other circuit courts regarding the offense charged under this Act. This Court should dispel this confusion and construe the statute to determine whether trying or attempting to obstruct, delay or affect commerce is an offense punishable under the Hobbs Act.

(2) The verdicts rendered by the jury as to Counts II and III are inconsistent. This issue need not be reached unless the Court rejects our first point. The lower court took the position that the case of **Dunn v. United States, 284 U. S. 390, 52 Sup. Ct. 189,** was controlling in this instance on this point (Appendix, infra, p. 30). We respectfully submit that the lower court has misinterpreted this Court's ruling in the Dunn Case.

This Court pointedly observed in the Dunn Case, supra, that no question was raised in the courts below with respect to the sufficiency of the various counts in the indictment. The Dunn Case was tried on the assumption that the indictment was good in all counts. The majority of the Supreme Court held that in view of this, the Court should make the same assumption and therefore the question of inconsistency was not reviewable.

A multiple count indictment does not necessarily mean that each count in an indictment alleges a punishable offense against the United States, and that all counts are sufficient. When the defendant fails to challenge the sufficiency of the various counts in the trial court, then the case proceeds to trial on the assumption that the various counts were sufficient. Defendants in the instant case *questioned the sufficiency of* Count III both in the trial court and in the Court of Appeals. In the trial court, defendants' motion to dismiss Count III was overruled. In the Court of Appeals this point was again raised for determination; however, the Circuit Court erroneously found Count III to be sufficient. (Appendix, infra, p. 36).

The Court of Appeals in its opinion further held:

> "* * * Interstate commerce having been established, jurisdictional requirements were satisfied and there can be no doubt but what the testimony was sufficient to justify the conclusion that the defendants' actions affected interstate commerce * * *."

Defendants were acquitted of affecting interstate commerce by an attempt to extort. The Court of Appeals in affirming the decision on Count III as per the last quoted paragraph, concluded that defendants' actions affected interstate commerce. Having been acquitted by the jury of affecting interstate commerce by an attempt to extort, this conclusion cannot be justified. We believe an irreconciliable conflict exists.

The theory of the government throughout the presentation of its case was to the effect that interstate commerce was obstructed and affected (R. 36, 41). In addition, the trial court withdrew from the determination of the jury a finding as to whether interstate commerce was affected or whether there was an attempt to affect interstate commerce. The Court instructed the jury that it alone could

determine whether interstate commerce was affected, but in no instance did it advise the jury that it also could determine whether there was an **attempt** or **effort** to affect interstate commerce. This instruction stated:

> "I charge you, as a matter of law, that if you believe the testimony of the government witnesses with reference to the federal jurisdictional element of interstate commerce involved in this case, that is to say, the government's testimony with reference to the bringing of various materials, commodities, and equipment, from out of state to the job site in question in this federal juridical district, then you are instructed that defendants' activities, as shown by the government's testimony, if you believe the same, did delay, obstruct and affect interstate commerce as that language is used in the statutes under which these charges are brought. That is to say, if you find the facts to be as testified to by the government's witnesses, the Court has determined as a matter of law that there has been a substantial affect on interstate commerce shown here by the United States and that question is not for your determination. However, before you can find the defendants guilty under any or all of the counts in the indictment you must find beyond a reasonable doubt that the defendants extorted money or property or conspired so to do, as those terms are defined in the statute and other instructions given you by the Court." (R. 198).

It is obvious that the jury did not believe the government's witnesses relative to the jurisdictional element of interstate commerce or of the defendants' attempt to extort when they acquitted the defendants on Count II of affecting commerce by attempting to extort.

The jury was not instructed directly or indirectly that if they believed the government's witnesses as to the fed-

eral jurisdictional element of interstate commerce, then the defendants could be found guilty of attempting to affect commerce. This issue as per the above quoted instruction, was withdrawn from the jury in their deliberations. We believe the acquittal on Count II was res judicata as to Count III in view of the evidence and the Court's instructions.

We further believe that the inconsistency which exists in the verdicts of the jury in this case are of such a nature that the Dunn Case, supra, is not controlling and that this Court should review this matter to clarify its meaning in the Dunn Case and its applicability to the instant one. It is obvious that this is an issue of importance, and in all probability may affect numerous defendants in the future.

(3) The trial court failed to charge the jury as to the provisions of law alleged to have been violated in Count III of the indictment. The only instruction in the Court's charge to the jury in referring to Count III, states:

> "Count III of the indictment involves the same matters as Count I and II, but in this count the charge against the defendants is that they attempted to obstruct, delay or affect commerce by the aforesaid means" (R. 195).

This general type of reference to a count in the indictment has been deemed reversible error by courts in other appellate circuits.

In **Lott v. United States, 5 Cir., 218 F. (2d) 675, l. c. 680, 681, Footnote 7,** the Court states:

> "We doubt that this was a sufficient charge of the law applicable to the various counts. The Court should define the various crimes charged, and the elements of each, to the extent necessary to enable the jury to apply the law to the facts."

Nowhere in the instructions does there appear any language, directly or indirectly, to inform the jurors as to what constitutes the alleged crime in Count III. Certainly, that portion of the instruction set forth above in our Point II, supra, which provides that if the jury believes government's witnesses relative to interstate commerce, then the activities of the defendants did, as determined by the Court, substantially affect interstate commerce, could not be deemed an element or a definition of the crime for which the defendants were charged in Count III. If anything, it would be misleading and ambiguous as to the crime alleged.

> "The charge to the jury should not leave the jurors in ignorance or leave them to their conjecture as to what constitute the offense charged." Morris v. United States, 9 Cir., 156 F. (2d) 525, l. c. 529.

The jury was not afforded any guide or directive as to the crime charged of attempting to obstruct, delay or affect interstate commerce by an attempt to extort. The failure to so instruct by the Court is an abandonment by the Government of said count in view of the instructions which were given.

In **Kenion v. Gill, D. C., 155 F. (2d) 176**, the Court held:

> "It is reversible error for a trial court to fail to define various crimes involved in an indictment and to fail to define elements of each, to the effect necessary to permit the jury to apply the law to the facts."

We believe that the mere general statement as to what Count III charged in reference to other counts, without further essential instructions thereto, is reversible error.

4 (a) During the course of the trial the government's attorney admitted it had in its possession F. B. I. reports which were not turned over to defendants for their inspection (R. 44). The government's attorney stated there

was nothing in his opinion in these reports which the government could turn over to the defendants. The trial court, after motion by defendants was made for these reports, examined same at home over the weekend and ruled that defendants were not entitled to see them. Defendants never have seen these admitted existing reports relating to testimony of government witnesses at the trial, and defendants have never been informed what they contain. This ruling clearly conflicts with the laguage of the Jencks case **(Jencks v. United States**, 353 U. S. 657), which holds defendants are entitled to inspect these reports and decide for themselves whether to use them in their defense. The practice of producing them for the trial judge was expressly disapproved by this Court in the Jencks case.

The Eighth Circuit in its opinion herein, stated that if the defendants were entitled to the reports, it was "error without prejudice" (Appendix p. 33). This decision by the Eighth Circuit is in direct conflict with that of the Third Circuit in **United States v. Rosenberg**, No. 451, O. T., 1958; 31 Cir. 1957, 245 F. 2d 870.

4 (b) The point was raised in the opinion by the Eighth Circuit herein, that a new trial on this ground could avail defendants nothing, citing **United States v. Lev**, Nos. 435, 436, 437, O. T., 1958; 2 Cir. 1957, 258 F. 2d 9, 13; on the theory that 18 U. S. C. A., Section 3500, has superceded the Jencks decision and the test for production of reports would prevent defendants from using the reports in question. In so saying, the Court overlooked the fact that the defendants were very much prejudiced at the time of their trial when Sec. 3500 was not yet law and when the Jencks decision should have been applied, and where they were denied possible vital information to use in their defense to impeach the credibility of the government's witnesses. Defendants did not ask for grand jury testimony or information vital to the defense of the nation, but only to examine what the government admitted it had.

(5) The newspaper articles that appeared during the course of the trial must certainly have had a very telling prejudicial effect upon the jury. The trial judge prevented defendants from interrogation of the jury as to what they read as was done in **Marshall v. United States**, No. 383, O. T., 1958; 10 Cir. 1958, 258 F. 2d 94; but the court itself inquired "I will ask if any juror here disobeyed the instructions of this Court and read the editorial that appeared in the Globe-Democrat this morning" and further, "Has anyone on the jury read the articles in the Globe or any other editorial that may have appeared in any paper or any of the news items about this case? If you have I will ask you, upon your honor, to hold up your hand at this time and tell me" (R. 79). Under this type of inquiry it would be a courageous juror who would admit that he had "disobeyed the instructions of the Court." To say there was no evidence that the jurors actually read these articles is folly, as indicated in the words of the Court in **Meyer v. Cadwallader**, E. D. Pa., 49 F. 32:

> "It is idle to say that there is no direct evidence to show that the jurors read these articles. They appeared in the daily issues of leading journals and broadcasts over the community. The jury separated at the close of each session of the Court, and it is incredible that going out into the community, they did not see and read these newspaper publications. That these public statements were well calculated to prejudice the jury against the defendants and deprive them of a fair trial, is the proposition so claimed that it would be a waste of time to discuss it."

An examination of the articles (R. 83, 173, 181) will show the inflammatory nature of the editorials and cartoons referred to, and that the probable influence is so obvious that defendants could not have had a fair trial before an unbiased jury. Appellants contend that in not granting a

new trial the Eighth Circuit's decision herein is in conflict with the Tenth Circuit in the Marshall case, supra.

6. The mere inquiry of the trial judge as to the division of the jury has been held by this Court in the Brasfield case (**Brasfield v. United States**, 272 U.S. 448) to be ground for reversal. The exact words of the colloquy between judge and the jury foreman may be found in the Record, p. 213.

The government in its brief before the Eighth Circuit conceded that the inquiry by the trial judge was "ill advised but not prejudicial." The Eighth Circuit in its opinion (Appendix p. 36) spoke about the necessity of a minority needed to be coerced and erroneously concluded from the foreman's answer to the trial judge that "It is pretty evenly divided" does not show such minority. There was no specific mention of division in the response and it is unknown if the jury were divided six to six, seven to five, or otherwise. From the foreman's answer there could have been a minority who were coerced. The minority factor as applied here by the Eighth Circuit is too narrowly construed in that the court intimates that if the jury stood seven to five or a lesser ratio that there was a minority to be coerced and if an equal division that there were none to so be coerced. If only one juror were the minority and the inquiry by the trial judge constituted reversible error under the Brasfield case, appellants urge that the same logic would hold true, a fortiori, if the judge coerced the minds of four, five or even six jurors who constituted the "pretty evenly" division.

The holding of the Eighth Circuit is therefore in conflict with the Brasfield case and the decision of the Second Circuit in **United States v. Samuel Dunkel & Co.**, 2 Cir. 1949, 173 F. 2d 506.

CONCLUSION.

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,899.

William H. Anderson,
Appellant,
vs.
United States of America,
Appellee.

No. 15,900.

Harry J. Hagen,
Appellant,
vs.
United States of America,
Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

[January 28, 1959.]

Wilton D. Chapman for Appellant William H. Anderson.

Jerome F. Duggan (Sidney W. Horwitz and Dubinsky & Duggan were with him on the brief) for Appellant Harry J. Hagen.

Murry L. Randall, Assistant United States Attorney (Harry Richards, United States Attorney, was with him on the brief) for Appellee.

Before SANBORN, WOODROUGH and VOGEL, Circuit Judges.

VOGEL, Circuit Judge.

William H. Anderson, Harry J. Hagen and Vincent J. Lee were jointly indicted and tried on a three-count indictment. By jury verdict Lee was found not guilty on all three counts; Anderson and Hagen were found not guilty on Counts I and II but guilty as to Count III; each was sentenced to five years' imprisonment.

Count I of the indictment charged the defendants with conspiring to obstruct, delay and affect commerce by extortion. Count II charged the obstruction of commerce by extortion in attempting to obtain money by threats of violence.

Count III, under which count Anderson and Hagen were convicted, charged that the defendants "* * * did wilfully, unlawfully and feloniously attempt to obstruct, delay and affect commerce (as defined in the act hereinafter designated) and the movement of articles and commodities in commerce, to wit, building materials, supplies, machinery, equipment and employees, by extortion (as defined in the Act hereinafter designated), in that the defendants did attempt to obtain from Richard I. Johnson, an agent and representative of the said Richard I. Johnson Plastering Company, Inc., property of the said Richard I. Johnson Plastering Company, Inc., to wit, Twelve Thousand Five Hundred Dollars ($12,500.00) of lawful monies of the United States of America, for their personal use and profit, by threatening physical violence to the person of the said Richard I. Johnson and upon the properties of the said Richard I. Johnson Plastering Company, Inc., and by using their aforesaid respective union capacities in a wrongful, arbitrary, unreasonable and oppressive manner to create industrial strife and unrest on the aforesaid 'hospital' construction project by refusing to permit union lathers and plasterers to be employed on said 'hospital' project, said union workmen being under the union juris-

diction of the said defendants, to begin their work duties, among other things, unless and until the said Richard I. Johnson Plastering Company, Inc., should pay to the defendants the aforesaid money; that the defendants, in the manner and by the means aforesaid, did attempt to obstruct, delay and affect the continuity of the construction of the aforesaid 'hospital' and the movement of articles and commodities in commerce, as aforesaid."

Evidence introduced at the trial indicated that in the year 1950 the Del E. Webb Construction Company held the general contract for the construction of a Veterans Administration Hospital at St. Louis, Missouri. On December 13, 1950, the Richard I. Johnson Plastering Company and Del E. Webb Construction Company executed a contract whereby the Johnson Plastering Company was to perform the lathing and plastering work on the hospital. During the latter part of November, 1950, Richard I. Johnson, president of the plastering company, and his general manager, Russell Hanson, arrived in St. Louis to investigate conditions prior to executing the lathing and plastering contract. Johnson stayed at the Chase Hotel. He communicated with John Meroney, who was in charge of the St. Louis office of the Inland Steel Company. Meroney took Johnson to see Karl Kohlmeyer, who called the defendant William H. Anderson, whereby an arrangement was made for Johnson to meet Anderson at the home of the defendant Harry J. Hagen. Anderson was agent and representative of the local plasterers' union. Hagen was agent and representative of the lathers district council in the City of St. Louis. Pursuant to agreement, Johnson went to the Hagen home where he met Anderson and Hagen. The three of them went into the basement and sat down. Anderson asked Johnson what it would be worth for him to come to St. Louis and not have any union trouble. Johnson replied that it would be worth a couple of Cadillacs, to which Anderson responded that they were

not interested in Cadillacs but were interested in money. He asked Johnson for $18,000.00. Johnson replied that it would be impossible to pay that amount and offered to pay $12,500 at $1,000.00 per month. Anderson said he couldn't give an answer as to that amount as there was another party who would have to give approval. Arrangements were made to meet the following morning at breakfast. Anderson told Johnson not to mention the conversation to anyone or he wouldn't live long enough to regret it. During the conversation in the basement of the Hagen home, Hagen was present but did not say anything.

Johnson and Anderson met the following morning at nine o'clock at the Chase Hotel, where they had breakfast. Anderson told Johnson he had talked to the third party and that it was okay to go ahead and he would let him know when and where and how the money was to be paid.

Johnson testified that he next met Anderson as a result of a telephone call in September, 1951, in front of the Hollywood Roosevelt Hotel in Los Angeles, California. Anderson had called Johnson, advising him that he wanted to see him. Johnson invited Anderson, his wife and a nephew, Leonard Boedeker and his wife out to dinner. Johnson had his wife and a Mr. and Mrs. Harry Kissel. During the early morning hours when Johnson and Anderson were alone, Anderson asked Johnson for $2,000.00. Johnson told him that he didn't carry that much money around with him but he would do the best he could. Anderson replied, "You better get it."

On February 20, 1951, Johnson subcontracted the lathing portion of the work to one Charles W. Fawcett. Percy McAllister, a St. Louis plasterer, became interested in doing the plastering work. In November, 1951, McAllister had a conversation with Anderson, telling Anderson that he was thinking of contacting Johnson about obtaining the plastering contract for the hospital. Anderson told

him that before he did he had better take the matter up with him because there had been some commitments made.

Subsequently, in the latter part of January or the early part of February, 1952, Johnson was in St. Louis, at which time he received a call at his hotel to go to St. John's Hospital in St. Louis where Anderson was a patient, that Anderson wanted to talk to him. Johnson went to the hospital that evening but before doing so, because he was frightened, he asked the cab driver to wait for him and to come to the hospital room in approximately 15 minutes and advise him that he had an urgent call. When Johnson arrived at the hospital room, there were several people present who left the room. Mr. Johnson was alone with Mr. Anderson. Anderson then asked Johnson for some money, to which Johnson replied that he didn't have any. Again Anderson said that he had better get it. Anderson then told Johnson about a man in San Luis Obispo who, in turning on the starter of his automobile, had his car blow up and that unless Johnson got some money the same thing could happen to him. Johnson replied that Anderson couldn't threaten him in his own home town. Immediately following this conversation, the cab driver came up and Johnson left with him.

On January 31, 1952, Johnson entered into a contract with McAllister to do the plastering work on the hospital. McAllister started the plastering work in June, 1952. He had a conversation with Anderson, at which time Anderson asked him if Johnson had contacted him and sent anything for him. McAllister replied that he didn't know what he was talking about and hadn't gotten anything from Johnson.

The next time they met Anderson asked McAllister to go with him to where his car was parked at Grand and Delmar in St. Louis. Anderson told McAllister that Hagen and defendant Lee, who was agent and representative of

the Operating Plasterers Association, were there in his car and that McAllister should tell them the same thing he had told Anderson. McAllister went to the car and told Hagen and Lee that he didn't know what Anderson was talking about in wanting to know if something was sent to him by Johnson. Defendant Hagen told McAllister to say nothing about this conversation and not to say anything to Charley Fawcett. McAllister replied that he would not say anything to Fawcett. Lee told McAllister that if something was not sent in pretty soon he would hold McAllister for it. McAllister replied he didn't know what Lee was speaking about and if Johnson sent something to him he would contact Lee.

In September, 1952, Mr. Hanson was in St. Louis and having lunch with McAllister in a restaurant, at which time Anderson came to their table and told McAllister that he wanted to talk to him. They left the table and walked a short distance away, at which time Anderson asked McAllister if the party with him was Hanson from Johnson's office. Anderson then went over to the table where Hanson was seated and asked Hanson if Johnson was in St. Louis, to which Hanson replied, "No." He then asked Hanson for Johnson's home telephone number. Hanson replied that he didn't know it. Thereupon Anderson took out his business card which he gave to Hanson, telling him to give the card to Johnson and tell him he wanted to talk to him.

Anderson and Hagen have appealed separately to this court. They were, however, jointly indicted, tried and convicted before the same jury. Their appeals will be considered in this single opinion, separate or individual reference being made to each defendant where that becomes necessary or expedient.

1. *Sufficiency of the indictment as to Count III.* Each defendant attacks Count III of the indictment under which

each was found guilty, claiming the count insufficient, Anderson on the ground that "* * * there was needed an overt act or allegation of an overt act in Count III of the Indictment, which was not present and further, the government had all of the elements of Count III incorporated into Counts I and II * * *." Hagen arguing "* * * a count in an indictment which charges an attempt to obstruct, delay or affect commerce, or the movement of any article or commodity in commerce, in any way, by either extortion or attempted extortion, fails to state an offense punishable under the aforesaid statute. * * * there must be an actual obstruction, delay or affect (sic) on commerce, regardless of the degree," and "The crime or the offense is the extortion or the attempted extortion, and the extortion or attempted extortion must obstruct, delay or affect interstate commerce."

We think the language of the third count of the indictment, which we have quoted in full, supra, is supported by the language of the statute, 18 U.S.C.A. § 1951, which, insofar as it may be pertinent herein, provides:

> "§ 1951. *Interference with commerce by threats or violence*
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion *or attempts* or conspires *so to do*, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be * * *." (Emphasis supplied.)

In response to a demand, the government furnished a bill of particulars. Therein the government admitted in item No. 4, "Richard I. Johnson Plastering Company, Inc., did not commence work under said contract." And item No. 13, "No express threats of violence to property were

made by any of the defendants." The indictment, however, does allege the performance of acts by the defendants toward consummation of the crime. It alleges that the defendants attempted extortion from on or about December 2, 1950, to the date of the indictment by threatening violence to the person and properties of Johnson and by using their offices to create industrial strife on the project and by refusing to permit laborers to work on the job. The bill of particulars and supplemental bills of particulars detail the specific threats and demands made by the defendants. We think Count III of the indictment amply withstands the attack against it. As Judge John Sanborn, speaking for this court, in *Hewitt* v. *United States*, 8 Cir., 1940, 110 F.2d 1, 5, said:

> "'The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Cochran and Saur* v. *United States*, 157 U.S. 286, 290, 15 S.Ct. 628, 630, 39 L.Ed. 704; *Rosen* v. *United States*, 161 U.S. 29, 34, 16 S.Ct. 434, 480, 40 L.Ed. 606. * * *'
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> * * * * * * *
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> "The sufficiency of an indictment should be judged by practical, and not by technical, considerations. It is nothing but the formal charge upon which an accused is brought to trial. An indictment which fairly informs the accused of the charge which he is required to meet and which is sufficiently specific to avoid the danger of his again being prosecuted for the same offense should be held good."

As to Hagen's charge that Count III of the indictment is insufficient because of failure to allege that interstate com-

merce was actually obstructed, etc., we must disagree. This court, dealing with the same statute (18 U.S.C.A. § 1951) in *Hulahan* v. *United States*, 8 Cir., 1954, 214 F.2d 441, 445, said:

> "We have no doubt that Congress has the power to deal with extortion or *attempted extortion actually or potentially affecting interstate commerce*, just as it has power to deal with unfair labor practices so affecting interstate commerce. *Nick* v. *United States*, supra, at page 668 of 122 F.2d. See and compare, *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601, 604-606, 59 S.Ct. 668, 83 L.Ed. 1014; *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 683-684, 71 S.Ct. 943, 95 L.Ed. 1284; *National Labor Relations Board* v. *Crowe Coal Co.*, 8 Cir., 104 F.2d 633, 638-639, certiorari denied 308 U.S. 584, 60 S.Ct. 107, 84 L.Ed. 489. Compare, also, *United States* v. *Employing Plasterers' Association of Chicago*, 347 U.S. 186, 74 S.Ct. 452. (Emphasis supplied.)
>
> It seems apparent from the language of the statute that it was the intent of Congress to protect interstate commerce against extortion or attempted extortion which in any way or in any degree reasonably could be regarded as affecting such commerce. The exaction of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment and supplies, or who are engaged in constructing facilities to serve such commerce, is, in our opinion, proscribed by the statute in suit."

In addition thereto, the evidence disclosed that while the Johnson Plastering Company did not actually commence work on the contract itself, it did send materials and equipment through interstate commerce in connection with this particular job. Interstate commerce having been established, jurisdictional requirements were satisfied and there

can be no doubt but what the testimony was sufficient to justify the conclusion that the defendants' actions affected interstate commerce through their attempted extortion. We hold Count III of the indictment as being sufficient.

2. *Inconsistency of jury's verdicts.* Each of the defendants argues that the guilty verdict on Count III is inconsistent with the acquittal verdicts as to Counts I and II. In *Downing* v. *United States*, 8 Cir., 1946, 157 F.2d 738, 739, this court said:

> "Prior to *Dunn* v. *United States*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356, 80 A.L.R. 161, there had been a conflict in the federal courts on whether an inconsistent verdict on the separate counts of an indictment could support a criminal sentence. The *Dunn* case settled the question, however, when the Supreme Court refused to reverse a conviction for inconsistency in verdict on the separate counts of an indictment, involving the same evidence, and said, 284 U.S. at page 393, 52 S.Ct. at page 190: 'Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. • • • If separate indictments had been presented against the defendant for possession (of intoxicating liquor) and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold.' "

Acknowledging the *Dunn* case as controlling here, we, nevertheless, find no inconsistency between a jury's verdict of not guilty of conspiracy or of obstructing commerce but guilty of attempting to obstruct commerce, even though the basis for each charge springs out of the attempted extortion of $12,500.00 from Johnson and the threats of physical violence against him and his company's properties.

3. *Sufficiency of the evidence to sustain the conviction of Hagen.* Hagen contends that the evidence was wholly insufficient to sustain the verdict against him and that the verdict of the jury acquitting him on Counts I and II warranted his acquittal on Count III.

A reiteration of the evidence *in toto* would appear unnecessary. The original demand for money was in the basement of Hagen's home with Hagen present. While he said nothing, the jurors were entitled to conclude that he acquiesced therein and that he and Anderson were acting in concert in attempting to extort money from Johnson. Hagen was also present when McAllister was told that if Johnson didn't send the money soon McAllister would be held for it. We think the jurors were entitled to draw the inference that in the attempted extortion Hagen was acting with Anderson.

4. *Defendants' demands for government to produce statements and reports of witnesses.* Both defendants contend that the court erred in its ruling on their motions for the government to produce for inspection statements, records and reports of government witnesses recorded by and in the possession of the United States. Defendants' demands concern the three government witnesses Johnson, Hanson and McAllister. As to Johnson, the government gave the defendants two statements or reports, one by the F.B.I. on February 23, 1953, and one by an Assistant United States Attorney, Boecker, on February 2, 1956. The one given to Boecker was signed by the witness. The one from the F.B.I. files was a substantially verbatim report of an oral interview subsequently approved by Johnson.

As to the witness Hanson, the government gave to the defendants a report dictated by Mr. Boecker on February 2, 1956, covering a joint interview with Johnson and Hanson which was subsequently approved by both witnesses.

While defendants contended otherwise, the witness testified that there was no other written statement or transcript of a statement of his.

As to the witness McAllister, the government gave the defendants a statement taken by Mr. Boecker on April 30, 1956, and approved by the witness. Defendants contended that a prior statement had been taken by F.B.I. Agent Heineke in 1953. The government denied possession of any such statement and the witness testified, "In 1953, I was interviewed by Otto Heineke of the FBI. I do not recall if he made notes of our conversation. Our conversation lasted for approximately twenty minutes and it was about the facts in connection with this case."

During the trial, and as a result of the defendants' demands and insistence that there were other reports and statements to which they were entitled, the trial judge twice examined the F.B.I. files and determined, "I have gone through them and I found nothing more than has been given in that case already. I have gone all through it over the week end and read the entire FBI file, but I find nothing more that I think you are entitled to and you have already been given." The record indicates that the defendants continued to dispute the government's contention that it possessed no reports or statements of government witnesses other than those already produced.

In *Jencks* v. *United States*, 1957, 353 U.S. 657, 668, relied upon by the defendants, the Supreme Court held that the petitioner there "* * * was entitled to an order directing the Government to produce for inspection all reports of [government witnesses] in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial", and, further, that he was entitled to inspect the reports to decide whether to use them in his defense. This does not mean that the defendants were entitled to sift

the government files from top to bottom in the hope that they might turn up something of value to them. The government contended that it had no reports or statements made by its witnesses other than those which had already been produced and, while the testimony is unsatisfactory and possibly conflicting, we do not consider that it established the existence and possession of any other reports and statements to which the defendants might be entitled under the *Jencks* rule. In addition thereto, the trial judge made careful search and found nothing.

Nevertheless, if our interpretation of the *Jencks* opinion is incorrect and the defendants were thereunder entitled to various summaries and other reports, the case merely presents error without prejudice. The trial court gave the defendants the rights they were entitled to under § 3500 of 18 U.S.C.A., albeit prematurely. A new trial on this ground could avail the defendants nothing. The Court of Appeals for the 2nd Circuit was presented with a similar situation in *United States* v. *Lev, et al.*, 2 Cir., 1958, 258 F.2d 9, 13, wherein they concluded:

> "While defendants may perhaps have been given a right to inspect a statement of this nature [investigator's summary of an interview with a witness written subsequently and not a substantially verbatim record] by the *Jencks* decision, supra, 353 U.S. 657, 668, 77 S.Ct. 1007, 1013, 1 L.Ed.2d 1103, the recent codification of discovery in this situation allows a defendant to examine only the following:
>
> '(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.' 18 U.S.C. § 3500 (e) (1) (2).

As this statute will apply on a new trial of any o these defendants, and as under it discovery of th summary cannot be required, the trial court's error i rendered harmless, *United States* v. *Miller*, 2 Cir., 24 F.2d 163, certiorari denied *Miller* v. *United States*, 35 U.S. 905, 78 S.Ct. 332, 2 L.Ed.2d 261."

See also *United States* v. *Angelet*, 2 Cir., 1958, 255 F.2 383, 385.

5. *Testimony of witness McAllister.* The defendant claim that the trial court erred in overruling their motio to preclude plaintiff's witness McAllister from testifying McAllister was a St. Louis plastering contractor who sub let the plastering work herein, beginning such work i June, 1952. In 1953 McAllister testified before the grand jury. In January, 1956, he moved permanently to Florida. Before doing so, he burned his business records after they had been checked by the Internal Revenue Department. In April, 1957, at the request of the defendants, a *subpoena duces tecum* was issued for the appearance of McAllister in St. Louis with certain of his records. McAllister appeared but his records were not available as they had been destroyed in 1956. In overruling the defendants' motion and allowing McAllister to testify, the trial court pointed out that there was nothing to indicate that McAllister's records could be relevant to this case. McAllister's testimony consisted of relating conversations he had had with the defendants concerning demands made by them of Johnson. There was no error in the court's ruling.

6. *Variance between bill of particulars and testimony.* Defendant Hagen contends that error was committed in allowing a variance between the bill of particulars and the testimony. The bill of particulars stated that Johnson did not commence work pursuant to his contract with Del E. Webb Company for the lathing and plastering. It is true that Johnson, due to his subletting to McAllister and Faw-

cett, actually did none of the lathing and plastering. However, prior to subletting he sent certain equipment and material through interstate commerce to the job site. The Webb Company installed some of this equipment and billed Johnson. The variance was inconsequential and no error was committed.

7. *Remarks of government counsel during trial.* It is contended by both defendants that a mistrial should have been granted because of improper remarks of government counsel and of one of government's witnesses. We have examined the statements, find them not to be of major consequence and no error in the rulings of the court.

8. *Newspaper articles.* It is further contended that a mistrial should have been granted because of the publication of certain newspaper articles during the course of the trial. At the beginning of the trial the jurors were cautioned not to read newspaper articles about the case. Subsequent inquiry by the court failed to reveal that any juror had violated such instructions. The court did not abuse its discretion in denying the motions. See *Smith* v. *United States*, 8 Cir., 1956, 236 F.2d 260, 269-270.

9. *Jury instructions.* Each of the defendants charges error in the court's instructions to the jury. We have examined the instructions in detail and find that considered as a whole they fully and fairly apprised the jury of the law applicable to this case and that no prejudicial errors were committed.

10. *Coercing of jury.* Both defendants contend that the court erred by inquiring as to the division of the jury and in giving an additional charge during its deliberations. After receiving the court's charge, the jury retired in the afternoon of July 12th. At 9:40 o'clock that evening the trial judge recalled them and, after ascertaining that they were not in agreement, stated to the foreman:

"Don't tell me how they stand or how they are divided. I might ask you this much, I want no numbers, don't tell me how much on one side or the other, but are they at all evenly divided, or is it very much one way or very much the other?"

To which the foreman replied:

"It is pretty evenly divided, Your Honor."

The court thereupon instructed the jury further, using some of the language approved by the Supreme Court in *Allen* v. *United States*, 1896, 164 U.S. 492, 501:

In support of their contention that the inquiry and subsequent charge coerced the jury into reaching an irreconcilable compromise verdict, defendants cite *Burton* v. *United States*, 1905, 196 U.S. 283, 305-308; *Brasfield, et al.* v. *United States*, 1926, 272 U.S. 448, 450; *Jordan* v. *United States*, 9 Cir., 1927, 22 F.2d 966, 967; *Stewart* v. *United States*, 8 Cir., 1924, 300 Fed. 769, 782-783; *Nigro* v. *United States*, 8 Cir., 1925, 4 F.2d 781, 783; and *United States* v. *Samuel Dunkel & Co.*, 2 Cir., 1949, 173 F.2d 506, 507.

The government concedes that the inquiry made by the trial court in the instant case was "ill advised" but it contends that it was not prejudicial and, under the circumstances, not coercive of the jury.

The teaching of most of the cases relied upon by the defendants is that where the inquiry from the court elicits the information that the jury is unevenly divided, the giving of the extracts from the opinion in *Allen* v. *United States*, supra, is probably coercive of the minority and, hence, prejudicial error. That is not the situation here. The trial judge was told that the jurors were "pretty evenly divided". From a purely practical standpoint, then, we do not see how the giving of a supplemental charge from the *Allen* case could possibly have been coercive.

Here there was no minority to coerce and the trial judge was meticulous in avoiding any reference to a minority. Cf. *Cook* v. *United States*, 5 Cir., 1958, 254 F.2d 871, where the error of inquiring of the jury as to how they stood numerically was aggravated by the suggestion that the jury might be confined through a four-day period while the judge was away. This was held to be reversible error. On the same date the same three judges from the 5th Circuit, in *Butler* v. *United States*, 5 Cir., 1958, 254 F.2d 875, held that while the inquiry as to how the jury stood numerically constituted error, it had no coercive effect upon the jury because the reply was, "We are trying each count. Sometimes we get pretty close and then again we are not". While constituting error, the substantial rights of the appellant were not affected and the conviction was affirmed.

In *Bowen* v. *United States*, 8 Cir., 1946, 153 F.2d 747, certiorari denied 328 U.S. 855, 66 S.Ct. 980, this court had before it a situation where the foreman of the jury, by unsolicited note, informed the court that it was deadlocked 11 to 1 and the trial court thereupon gave a supplemental instruction urging the jurors to agree if they could conscientiously do so. The defendant there based his claim of error upon the *Burton* and *Brasfield* cases. This court stated, at page 752 of 153 F.2d:

> "In the *Brasfield* case, the Supreme Court ruled that it is reversible error for a judge to inquire of a jury, unable to agree, the extent of its division numerically. This, upon the theory that the general tendency of such an inquiry is coercive and that 'such a practice, which is never useful and is generally harmful, is not to be sanctioned.' Page 450 of 272 U.S., page 136 of 47 S.Ct., 71 L.Ed. 345. All that the Supreme Court has thus far held is that it is improper for a trial judge to inquire of a jury, which has failed to agree, how they are divided numerically, and that

if a judge makes the inquiry he commits reversible error.

* * * * * * * *

* * * We fail to see why the unsolicited information furnished to the court by the foreman of the jury should cause a mistrial or should preclude the court from giving a proper supplemental instruction to the jury."

Cf. *St. Louis & S. F. R. Co.* v. *Bishard*, 8 Cir., 1906, 147 Fed. 496, 499-502; *Stewart* v. *United States*, supra, at pages 782-787; *Lucas* v. *United States*, 8 Cir., 1921, 275 Fed. 405, 407-408; *Shaffman* v. *United States*, 3 Cir., 1923, 289 Fed. 370, 374-375.

Our conclusion here is that the two defendants who were convicted on the third count of the indictment received a fair trial, that there was no coercion in giving to the "pretty evenly divided" jury the guarded instruction used here. No substantial rights of the appellants were affected.

We have considered all points raised by the defendants and find no error.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment in Cause No. 15899.)

United States Court of Appeals
for the
Eighth Circuit.

No. 15899 September Term, 1958

Wednesday, January 28, 1959

William H. Anderson,

Appellant,

vs.

United States of America,

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, William H. Anderson, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

January 28, 1959.

(Judgment in Cause No. 15900.)

United States Court of Appeals
for the
Eighth Circuit.

No. 15900 September Term, 1958

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January 28, 1959.